

SEX DISCRIMINATION IN EMPLOYMENT

Fifth Edition

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Sex Discrimination in Employment

Fifth Edition

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DISCLAIMER

Please be advised that the purpose of this booklet is to provide basic information and is not to be used for the purposes of legal advice or guidance. In addition, because the law of sexual discrimination is regularly refined, revised or interpreted by legislative, judicial and regulatory branches of government, the law cited in this booklet may not be current. For legal assistance regarding any sexual discrimination you may experience in your employment, please consult an attorney.

The Women's Law Center of Maryland, Inc. shall not be responsible for any claims or actions resulting from reliance on the information contained in this booklet.

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CHAPTER 1 - INTRODUCTION

Women have made enormous progress toward the goal of achieving equality and respect in their working lives. However, for many women the American workplace still remains a place of unequal pay and career opportunities, insecurity and fear due to sexual harassment, and conflict and discrimination arising out of competing workplace and family caregiving responsibilities.

Although sexual harassment may be the most painful and severe problem impacting women in the workplace, it constitutes just one aspect of sexual discrimination. At one time or another, many women have asked themselves one or more of the following questions:

- Have I been denied a job opportunity simply because I am a woman?
- Am I paid as well as my male colleagues who perform the same job?
- Have I been treated differently from my male colleagues due to my pregnancy?
- Will I be penalized at work, or even lose my job, if I take time off to tend to family care-taking responsibilities?
- How can I stop workplace sexual harassment and maintain my job security?

To begin asking questions is the first step toward remedying sexual discrimination in the workplace. The purpose of this booklet is to help employed women and women seeking employment understand their employment rights, recognize sex discrimination, and act to effectively challenge and overcome discrimination when confronted with it.

FACTS ABOUT WOMEN IN THE WORKPLACE

A majority of women work.

In 2004, about 59% of women were participating in the labor force (this includes employed and unemployed women). In Maryland in 2000, nearly 63% of women were in the labor force.

Economic need to support self and family drives the decision to work.

Nationally, in 2004, 77.5 percent mothers of children between the ages of 6-17 years participated were working; 62.2 percent of mothers of children under 6 were working. In Maryland in 2000, nearly 70% of women with children under age 6 were working. Furthermore, many Maryland women are in single-headed households, with or without dependents, and are in need of supporting themselves financially. In 2000, nearly half of all Maryland women aged 15 and over lived without a spouse present in the household.

Women continue to earn less than men.

Although the average female worker is as well or better educated than the average male worker, in 2002 women still only earned about 77 cents for every dollar that men earned, according to the U.S. Department of Labor. In that same time frame, Maryland women earned 81.4% of male earnings.

Pay disparity cannot be explained by measurable differences.

Comparing men and women in Maryland who are full-time and full-year workers, women make 82 percent as much as men. More than one-fifth of the differences in women's and men's earnings cannot be explained by differences in their education, potential work experience, job characteristics or other measurable factors.

Sources: *The Status of Women in Maryland*, Institute for Women's Policy Research & Maryland Commission for Women, 1995.

United States Department of Labor, Women's Bureau.

Maryland Commission on Women, Profile of Maryland Women: 1980-1990.

Institute for Women's Policy Research Report to the Maryland Equal Pay Commission, July 19, 2006

CHAPTER 2 - OVERVIEW OF SEXUAL DISCRIMINATION LAW

A wide variety of state and federal laws have been enacted to combat sex discrimination. These laws include the following federal statutes: Title VII of the Civil Rights Act of 1964, as amended in 1991, the Pregnancy Discrimination Act, and the Equal Pay Act. Maryland's primary anti-discrimination laws are Article 49B and its own Equal Pay Act.

The laws prohibiting employment discrimination are based on the premise that an employer must evaluate each person as an individual without regard to sex and must assess each individual's qualifications in light of the requirements of a specific job. For example, an employer cannot refuse to hire or promote women because of the belief that women typically stop working when they marry or have children. Moreover, employers cannot segregate male and female jobs because they believe men make good managers, are aggressive and take charge, or that women deal better with detail work, have patience, and can handle repetitive jobs.

Despite the existence of numerous laws protecting you from discrimination in the workplace, it is not easy to challenge your employer when you feel a law has been broken. If you have experienced discrimination on the basis of your sex, you will need patience and perseverance to remedy the situation. But, after persevering, you may be reinstated to your old job, receive back pay, or otherwise be compensated for the harmful effects of the treatment. Of course, discrimination must be challenged if it is to be stopped.

The following pages provide an overview of the laws protecting people from discrimination on the basis of sex.

FEDERAL LAWS PROHIBITING SEX DISCRIMINATION

Title VII of the Civil Rights Act

- **Prohibits** discrimination based on race, color, religion, national origin, or sex in hiring, firing, wages, and benefits; in classifying, referring, assigning, or promoting employees; in training opportunities, retraining, apprenticeships, or any other terms, conditions, or privileges of employment. In spring 2008, the U.S. Congress passed the Genetic Information Nondiscrimination Act, which was expected to be signed by the President. The law would prohibit employers from discriminating against prospective or current employees on the basis of genetic information, e.g., tests indicating that a person has a genetic marker predictive of certain diseases. (It also prohibits this information from being shared with employers and prospective employers.)
- **Prohibits** sexual harassment as discriminatory conduct that is prohibited by law.
- **Applies** to every private employer in the United States with 15 or more employees; most states have similar laws, some of which apply to employers with fewer than 15 employees.
- **Requires employees** to file a charge with the Equal Employment Opportunity Commission [EEOC] or state or local human relations commission generally **within 180 days of the date that the discriminatory act took place.**

- **Provides** for a variety of remedies, including back pay, reinstatement, compensatory damages, and punitive damages.
- **Amended** in 1991 by Congress to overrule Supreme Court decisions of the 1980's that had severely restricted the ability of discrimination victims to win their cases. For the first time, victims were permitted to bring their cases before a jury. Moreover, the act expanded remedies for discrimination beyond awards of reinstatement and back pay to include compensatory and punitive damages.
- **Limited** in cases of unequal pay by the 2007 *Ledbetter v. Goodyear* Supreme Court decision which requires female workers to file claims alleging discrimination, including disparate pay, within 180 days of the decision that created the first instance of unequal pay, regardless of when the employee finds about the discriminatory pay. There have been federal and state legislative initiatives to remedy the *Ledbetter* decision, although as of June 2008 these were not yet successful.

Pregnancy Discrimination Act

- **Prohibits** employers from discriminating against a woman because of pregnancy, childbirth or related medical conditions. This includes firing or refusing to hire or promote a woman because she is pregnant, or discriminating against a pregnant woman in the provision of benefits or leave.
- **Requires employers** who offer fringe benefits such as health, disability, and paid leave to treat pregnancy the same as any other disability or condition.
- **Requires employees** to file within 180 days of the employer's discriminatory act.
- **Provides** for all of the same remedies that are available under Title VII.
- **Amended** Title VII to include pregnancy discrimination.

Equal Pay Act

- **Requires** all employers to provide equal pay for men and women who perform equal work within an establishment or workplace, unless the difference in pay is based on a seniority or merit system, the amount of work the employee actually produces, or any factor other than sex.
- **Prohibits** unequal pay in the context of overtime, uniforms, travel accounts or any other type of wages or benefit of value. In addition, employers are not allowed to reduce the wages of any employee to eliminate illegal wage differences.
- **Allows** victims to file suit within two years after the "cause of action" or discriminatory act occurs; cause of action arising from a willful violation may be brought within three years of the incident. ("Willfulness" means that the employer either knew about or showed reckless disregard for the discrimination.)
- **Enforced** by the Equal Employment Opportunity Commission. Complaints may also be made to the Wage and Hour Division of the U.S. Department of Labor.
- **Provides** back pay for wages not properly paid, plus an equal amount as liquidated damages, and possibly attorney's fees, interest and costs.

Family And Medical Leave Act

- **Requires** private employers of 50 or more employees to provide up to 12 weeks of unpaid leave to eligible employees for certain family and medical reasons. Employees are eligible if they have worked for a covered employer for at least 12 months prior to the leave request, and during that 12 months the employee must have worked at least 1,250 hours.
- **Requires** an employee's coverage under group health plans to be continued during FMLA leave under the same terms and conditions as it would have had the employee remained at work.
- **Allows an employee to take** unpaid leave to care for employee's child after birth or placement for adoption or foster care; to care for the employee's spouse, child, or parent who has a serious health condition; or for a serious health condition that makes the employee unable to perform his or her job.
- **Allows employees** who feel that their FMLA rights have been violated to either 1) file a complaint with the Secretary of Labor, or 2) file a private lawsuit. Private lawsuits must be filed within two years after the last action that was taken in violation of the Act. However, if the employer has violated the Act willfully the statute of limitations is extended to three years.
- **Enforced** by the Wage and Hour Division of the U.S. Department of Labor. Employee may also seek relief by private law suit.

Executive Order 11246

- **Prohibits** federal contractors and federally-assisted construction contractors and subcontractors, who perform over \$10,000 in Government business in one year from discriminating in employment decisions on the basis of race, color, religion, sex, national origin or status as a Vietnam era veteran or special disabled veteran. The Executive Order also requires Government contractors to take affirmative action to insure that equal opportunity is provided in all aspects of their employment.
- **Requires** employers with a non-construction service or supply contract or subcontract of \$50,000 or more, and with 50 or more employees, to study the under-representation of qualified women and minorities in the employer's workforce and adopt a written plan to remedy any underutilization.
- **Enforced** by the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP).

Fair Labor Standards Act

- **Requires** employers to pay almost all employees at no less than the minimum wage for all hours worked, plus, in many cases, time-and-one-half for all hours worked over 40 in one week, that is, one seven-day period. Covered nonexempt workers are entitled to a minimum wage of not less than \$5.85 per hour effective July 24, 2007; \$6.55 per hour effective July 24, 2008; and \$7.25 per hour effective July 24, 2009.
- **Applies** to typically undercompensated jobs, including child care, domestic services, house cleaning, and other service jobs traditionally occupied by women. Victims of

employers who fail to pay minimum wage may be entitled to up to twice their back wages owed, plus attorneys' fees.

- **Enforced** by the Wage and Hour Division of the U.S. Department of Labor. Employees may also seek redress by private law suit.

Women's Health And Cancer Rights Act Of 1998

- **Requires** any group health plan that covers mastectomies to also cover breast reconstruction and prosthesis and that reconstruction be required to produce a symmetrical appearance with the remaining breast as well as prosthesis and treatment for any physical complications arising from the mastectomy.

MARYLAND LAWS PROHIBITING SEX DISCRIMINATION

Laws Specifically Prohibiting Gender Discrimination

Maryland's Fair Employment Practices Law (MD Code, Art. 49B)

- **Prohibits** discrimination in employment, by employers, employment agencies, labor unions, and job placement advertisements, on the basis of race, color, religion, sex, age, national origin, marital status, disability, sexual orientation, genetic information or refusal to take or share results from a genetic test.
- **Prohibits retaliation** by an employer or other covered entity against any employee who challenges or opposes any of the above-referenced types of discrimination, including but not limited to filing a charge with the Maryland Commission on Human Relations (MCHR).
- **Requires employers** to treat disabilities caused or contributed to by pregnancy or childbirth on the same terms as they would treat any other temporary disability.
- **Applies** to employers with 15 or more employees.
- **Requires employees** alleging discrimination to file a charge with the MCHR within six months of the date that the discriminatory act took place. Employees may also choose to file a private cause of action in civil court, after 180 days of filing a charge with the local, state or federal agency. (Howard, Montgomery and Prince George's Counties have their own human relations laws that allow private lawsuits under them. However, Maryland law requires that those suits be filed within two years of the discriminatory act. **Check your local jurisdictions fair employment ordinances for the filing deadlines established by them.** Baltimore County provides a private cause of action for workers of employers with less than 15 employees. The Maryland Code requires that these suits be filed within two years of the discriminatory conduct and no punitive damages are allowed under such suits. St. Mary's County also has its own human relations ordinance, but does not provide a private cause of action. Maryland recognizes the filing of a charge under St. Mary's ordinance as satisfying the filing requirement under Article 49B.)
- **Remedies under 49B** include reinstatement, back pay, attorneys' fees, compensatory and punitive damages, with damage awards being limited from \$50,000 to \$300,000 according to the size of the employer.

Maryland's Equal Pay Act (Md. Ann. Code, Labor & Employment Article, §3-301 *et seq.*)

- **Prohibits wage discrimination:** An employer may not discriminate between employees in any occupation by paying a wage to employees of one sex at a rate less than the rate paid to employees of the opposite sex if both employees work in the same establishment and perform work of comparable character or work on the same operation, in the same business, or of the same type.
- **Permits** compensation disparities between male and female employees if the disparity is based on a merit system, a seniority system, jobs that require different abilities or skills, jobs that require regular performance of different duties or services, or work that is performed on different shifts or at different times of day.
- **Applies** to any employer conducting businesses or otherwise performing work in the state of Maryland.
- **Remedies** include the difference in wages paid to the male and female workers, plus an equal amount as liquidated damages. Furthermore, reasonable attorneys' fees may be recovered.
- **Requires employees** to file suit within three years of the pay discrimination. Maryland's Labor Commissioner may also file suit on behalf of employees.

Maryland Apprenticeship and Training Council (as created by statute Labor and Employment Article, §11-405, Annotated Code of Maryland and governed by regulations, COMAR 09.12.52.00)

- **Disallows** the certification of occupational training programs that discriminate on the basis of political or religious opinion or affiliation, marital status, race, color, creed, national origin, sex, or age, unless sex or age constitutes a bona fide occupational qualification, or the physical or mental disability of a qualified individual with a disability. Also prohibits retaliation against an apprentice or trainee for filing or assisting in an investigation of a complaint of discrimination.
- **Applies** to all employers having apprenticeship or on-the-job training programs that are registered with the Maryland Apprenticeship and Training Council or that charge tuition or fees.
- **Requires** employers to comply with affirmative action laws and to develop written affirmative action plan.
- **Enforced** by the Maryland Apprenticeship and Training Council.

Commercial Non-Discrimination Act (Md. Code, State Finance and Procurement, §19-101, *et seq.*)

- **Prohibits** state contractors from discriminating in the solicitation, selection, hiring, or commercial treatment of vendors, suppliers, subcontractors, or commercial customers on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, disability or any otherwise unlawful use of characteristics regarding the vendor's, supplier's or commercial customer's employees or owners.

- **Protects the following persons and entities from commercial discrimination:** Any person, defined in §1-101(D) of the State Finance and Procurement Article as an individual, receiver, trustee, guardian, personal representative, fiduciary, or representative of any kind and any partnership, firm, association, corporation, or other entity, or any firm, sole proprietorship, partnership, corporation, limited liability company, or other business entity or a combination of any of these entities, including any financial institution, developer, consultant, prime contractor, subcontractor, supplier, or vendor, that has submitted a bid or proposal for, has been selected to engage in, or is engaged in providing goods or services to the State. (See, the Maryland Commission on Human Relations' website on this subject: <http://cnd.mchr.state.md.us/faq.html#3>.)
- **Allows** victims of commercial discrimination to file complaints with the Maryland Commission on Human Relations up to four (4) years after the alleged discriminatory action.
- **Remedies** include disqualification of the discriminatory contractor from future business with the state of Maryland, cancellation of any ongoing contracts, mediation with any remedy agreed to by the parties involved.

The Code of Fair Employment Practices (Maryland Executive Order No. .01.01.2007.16)

- This is the Executive Order (EO) that Governor O'Malley issued in 2007 replacing a prior executive order on the matter. It implements the mandate of Title 5, Subtitle 2 of the State Personnel and Pensions Article of the Maryland Annotated Code which establishes an Equal Opportunity Program and mandates that state Executive Branch employees and applicants for employment be treated according to merit and fitness only. The EO requires that all personnel actions be taken on the basis of merit and fitness, and without regard to age, ancestry, color, creed, gender identity and expression, genetic information, marital status, mental or physical disability, national origin, race, religious affiliation, belief, or opinion, sex, or, sexual orientation.
- **Requires** the establishment of Fair Practices Officers throughout the Executive Branch departments and the development of fair employment practices (EEO) complaint procedures and education programs.
- **Requires** the establishment of affirmative action and diversity education programs for executive agencies and departments.

Code of Fair Practices for contractors with the state, State Finance and Procurement, Title 13-219

- **Prohibits** contractors and subcontractors on state contracts from discriminating against an employee or applicant for employment on the basis of sex, race, age, color, creed, or national origin.
- **Provides** that the Board of Public Works may take remedial actions in response to complaints about violations of this subtitle.

TORT LAWS

Although Title VII and Maryland's Fair Employment Practices Law provide the principal remedies for victims of sexual harassment, some state tort laws provide victims of harassment the opportunity to sue for compensatory and punitive damages resulting from personal injuries suffered due to harassment. These actions include the following:

- intentional infliction of emotional distress,
- invasion of privacy; and,
- assault and battery.

In addition, where rape, physical or sexual assault, or stalking has occurred, a victim may file criminal charges against the perpetrator.

A growing number of states, including Maryland, prohibit the termination of an employee when the discharge conflicts with the state's public policy. This cause of action, called **wrongful discharge, abusive discharge, or retaliatory discharge**, arises when an employer's motivation for discharge is contrary to some clear mandate of the public policy of the state.

An example of wrongful discharge would be if an employer terminates its employee for one of the following reasons:

- exercising his or her First Amendment rights;
- taking time off from work for jury duty;
- refusing to engage in illegal activity; or,
- filing a worker's compensation claim.

In addition, if an employer is exempt under the Fair Employment Practices Act, e.g., has fewer than 15 employees, an employee may bring an action for wrongful discharge in a Maryland state court based on sex discrimination. Other state law claims that might be relevant in a wrongful discharge suit include intentional infliction of emotional distress, fraud, or defamation.

CONTRACT LAW

Maryland courts have recognized that personnel policies relating to termination and layoffs, as established in employee handbooks or manuals, may be enforceable as terms of an employment contract. For example, if an employer states in its handbook that an employee will only be discharged for "just cause" or after a series of disciplinary procedures have taken place, the employer's failure to abide by its own policies may constitute a breach of contract. In order for the "contract" to be enforced, however, the policy must be specifically communicated to the employee and not disclaimed by the employer as not constituting a contractual obligation.

CHAPTER 3 - FORMS OF DISCRIMINATION

Sex discrimination typically occurs in one of two ways: (A) disparate treatment or (B) disparate impact. The type of discrimination you claim affects the type of proof you must provide to the investigating agency or in court.

DISPARATE TREATMENT

Disparate treatment occurs when an employer treats one person or group better or differently from another person or group on the basis of sex, race, color, religion, national origin, physical or mental disability or some other protected group or protected individual characteristic. When an employer admits to this behavior, it is engaging in **overt or facial discrimination**. (Facial in this context means clearly, apparent in the words used or in the structure of a practice or policy. Some commentators have recently spoken of “facial discrimination” to refer to discrimination based on a person’s physiognomy, which is not currently a legally protected class unless it is connected to race, gender or another protected group’s characteristics.) More often, an employer may treat people in protected groups differently, but refuses to admit or acknowledge it. This is covert discrimination. Both types of discrimination are discussed below.

Facial or Overt Discrimination

When an employer admits by word or clear action that it treats its employees differently according to a certain protected factor, such as sex, disability or age, that employer is engaging in facial or **overt discrimination**. For example, an employer that advertises that it will only hire men for a certain job is engaging in facial discrimination.

When an employer can show that its exclusion of women from a certain job is based on a **bona fide occupational qualification** (“BFOQ”), the discrimination may not be illegal. Specifically, an employer may argue that it is essential that the person performing the job at issue is male. Sex constitutes a BFOQ, however, for only a very few jobs.

A BFOQ does not include an employer only hiring men based on generalizations concerning the physical capabilities of the average woman. For example, an employer may try to argue that only men can perform certain construction jobs because the work requires strength. The law requires that if a job actually requires strength, each applicant must be permitted to prove his or her ability to perform the job.

Similarly, a BFOQ does not include an employer’s refusal to hire or promote women based on stereotypes such as a “lack of aggressiveness” or a “high turnover rate”. Nor will the preferences of customers or co-workers for one sex justify imposing a sex-based requirement. For example, an airline may not require its female flight attendants (but not the male flight attendants) to use cosmetics simply because it perceives that customers prefer to be served by women wearing make-up.

Another example of facial or overt discrimination that is prohibited by Title VII, as amended by the Pregnancy Discrimination Act, is the exclusion of women of childbearing age from jobs

where they may be exposed to hazardous substances. As held by the Supreme Court in the 1991 case of *International Union v. Johnson Controls*, a woman's capacity to bear children does not interfere with her ability to perform the duties of her job and an unconceived fetus is not considered a third party whose safety is essential to the company or business employing the woman. Thus, your employer may not ban you from certain jobs simply because it believes that you may someday become pregnant.

To prove facial discrimination, you must show that the required qualification is not reasonably necessary to the normal operation of your employer's business. In other words, once your employer makes a BFOQ claim, you must respond by showing that your employer could do business without the requirement.

“Covert” Disparate Treatment

Disparate treatment also occurs when your employer treats you differently because of your sex but does not admit to treating you any differently. The central issue in these cases is whether the employer intentionally treated you less favorably because of your sex.

You may prove disparate treatment circumstantially by establishing a *prima facie* case. In a case involving hiring discrimination, this would include the following factors:

- a. You are a member of a class or group protected by law (e.g., a woman);
- b. You applied for and were qualified for the job;
- c. You were rejected despite your qualifications; and
- d. After your rejection, the position remained open and the employer continued to seek applications from men without your qualifications, or the employer hired a man.

Once you have established a *prima facie* case, your employer would then have an opportunity to show a legitimate, nondiscriminatory reason for its decision. For example, the employer could show that the man who was hired had better qualifications than you, had good connections in the industry, or would take the job at a lower salary.

If the employer presents such nondiscriminatory reasons for the employment decision, you would then have to establish that the supposedly legitimate reason is a “pretext” for the discriminatory reason- that is, notwithstanding your employer's explanation, the real reason for the decision was your sex. You, as the employee charging discrimination, bear the ultimate burden of proof of your claim that your employer's motive was, in fact, discriminatory. Sometimes you can use evidence, if such exists, that shows that the employer has a “pattern and practice” of discriminating against women, and, therefore, you as a female employee were similarly discriminated against. The types of evidence you might use to demonstrate a pattern and practice of sex discrimination include: statistics, co-worker testimony, statements made by decision-makers, evidence of particular exclusionary practices, and other evidence.

The following are examples of disparate treatment:

1. An employer decides during a reduction in force to lay off women with more seniority than men in the same job classification because the employer believes that men, as the “primary bread winners,” should be the last to be laid off.
2. An employer refuses to promote women to management positions.
3. An employer questions female job applicants about their children or marital status but does not question male applicants about theirs.
4. Men performing the same job as women receive more pay or greater benefits.

All of these practices, and many more with similar intent and impact on female employees, are illegal.

A Special Note About Mixed Motive Cases: In some cases, an employer may discriminate against a female employee not only because of her sex, but also for another, legitimate reason. This is known as a mixed motive case.

The Civil Rights Act of 1991 requires a complainant to show only that sex was one of the factors behind the decision which hurt the employee. The Act makes any reliance on a discriminatory motive illegal. The employer can avoid liability, however, if it can show that it would have taken the same action even if it had not considered the impermissible discriminatory factor.

DISPARATE IMPACT

Disparate impact exists when an employer, by using a specific employment policy or practice that is neutral on its face (meaning that it does not expressly state that it applies only to a particular group of people), creates the effect of excluding protected groups, such as women or minorities. Title VII prohibits such employment practices that are fair in form, but that discriminate in effect.

In disparate impact cases, you do not have to prove that the employer intended to discriminate. However, you do have to prove that the employer has a specific practice that causes the unequal treatment of a sizable number of employees within a protected class, such as women workers.

If you as a female employee, or group of female employees, demonstrate such disparate impact, the employer must then show that the alleged discriminatory practice either does not in fact have a significant adverse impact, or that, despite the impact, the practice is job-related for the job in question, or is consistent with business necessity. This defense is also sometimes called the “**bona fide occupational qualification defense**” or **BFOQ defense**.

To rebut the employer's argument you can show that there is an alternative practice which would have a lesser adverse impact on the protected group, but which the employer refuses to consider. These cases typically require statistical evidence to prove the alleged disparate impact discrimination.

An Example of an Illegal Neutral Policy that has discriminatory disparate impact: A requirement that all truck drivers be at least 5 feet, 8 inches tall where there is no relationship between the requirement and the actual demands of the job. Such a policy results in a discriminatory effect or "impact" on women. More women than men will be excluded from the job because far fewer women than men are that tall.

CHAPTER 4 - ENCOUNTERING DISCRIMINATION OR FAILURE TO PAY COMPENSATION OR PROVIDE FAMILY OR MEDICAL LEAVE

If you encounter discrimination because of your sex, you may file a charge with the EEOC, the MCHR, or a local (county or city) administrative agency. This includes discrimination when you are looking for a job, applying for a job, working on a job, or being fired from or leaving a job.

DISCRIMINATION WHEN LOOKING FOR A JOB

Help Wanted Advertisements

Job advertisements or available position postings might also signal the existence of sex-based employment discrimination. For example, an advertisement or posting might refer specifically to seeking men or seeking women applicants. Regardless of whether an advertisement states or implies a male preference, women are entitled to apply for the job and receive equal consideration. While gender specific job ads are not appropriate and may indicate of a discriminatory workplace, general headings such as “salesman,” “repairman,” or “foreman” are not considered illegal. Such terms are deemed to apply to both men and women. Many employers, however, have begun using gender-neutral job titles, such as “salesperson” or “sales.”

Employment Agencies

Title VII and other laws prohibit employment agencies from discriminating or from helping employers to discriminate. If you are discouraged from applying for certain jobs by an employment agency simply because of your sex, you may file a charge against the agency.

Word of Mouth Recruitment

Discrimination may occur if an employer relies primarily upon employees informing friends and relatives of vacancies. For example, when a company’s existing workforce is mostly male, its employees tend to notify other males of job openings. The effect of this practice is that the workforce may remain primarily male. Although it would be difficult to prevail in any lawsuit on the basis of those facts alone, you should not hesitate to apply for such a job if you believe you are qualified.

DISCRIMINATION WHEN APPLYING FOR OR INTERVIEWING FOR A JOB

Discrimination laws restrict the type of questions that employers may ask job applicants. There are two general rules regarding application and interview questions. First, all questions must be job-related and related to your ability to perform the job. Second, the interviewers should ask the female candidates the same questions as the male candidates, and vice-versa.

Questions about having children may or may not be discriminatory. For example, an employer who hires no one, male or female, who has small children, may ask about children. An employer may not, however, refuse to hire women who have young children while hiring men who have young children. Furthermore, it may be that a question about small children really is indicative of discrimination against mothers, which has been recognized by some courts as a form of prohibited sex discrimination. Furthermore, questions about birth control are almost always improper.

Again, you should be aware of “neutral” job requirements, such as height or weight requirements or ability to lift heavy objects. If these requirements are not necessary for the job, they are unfair to women in most cases and may be illegal.

Likewise, participation in varsity sports or military service cannot be required of management trainee applicants. These requirements are not necessary to management trainee job skills and have the effect of excluding women.

DISCRIMINATION ON THE JOB

Wages, Fringe Benefits and Pay Equity

Under the federal Equal Pay Act and Maryland’s Equal Pay Act, it is illegal for an employer to pay women less than it pays men for performing substantially similar work. Pay includes actual wage or salary, benefits, bonuses and/or commissions. To prove that your employer violated these laws, you must show that your salary (or other benefits) is lower than the salary of a man who works in the same establishment and whose job requires skill, effort, and responsibility equal to your job. The same “establishment” may include all of the company’s branches if a central authority sets wages.

“Equal” skill, effort, and responsibility mean substantially equal. Slight differences in duties will not prevent an equal pay claim.

If a man takes a job previously held by a woman, he should not get a higher salary than she did, if the two have similar qualifications. Similarly, a woman taking a job that was performed by a man should not be given a lower salary, if she is equally qualified.

In addition, an employer may not require a female manager to perform secretarial tasks if male managers are not required to perform these tasks. Likewise, a woman cannot be required to perform administrative work on a secretarial salary if men are not required to do the same.

Part-time employees may be paid less than full-time employees, but an employer may not keep women’s salaries low simply by classifying only women as part-time. Also, an employer cannot keep only women employees permanently in “temporary” positions, so that they are unable to earn sick leave, vacation pay, or other benefits.

All fringe benefits must be offered equally to both sexes. If insurance benefits are offered to a male worker’s family, the same benefits must be offered to a female worker’s family. In

addition, insurance benefits cannot be offered only to “heads of households” when the effect is to discriminate against women.

Sexual Harassment

Sexual harassment can be a form of illegal sex discrimination. Though public awareness of this form of workplace discrimination has increased, it remains a severe and pervasive problem for many female workers. According to some national surveys up to 65% of all female workers believe they have been sexually harassed at work. In 2004 the National Partnership of Women and Families issued a study looking at sexual harassment and found that claims of sexual harassment increased among all major racial/ethnic groups, but that reports of harassment increased particularly among African-American and Hispanic female workers. It is important to recognize that, although women comprise the vast majority of persons subjected to sexual harassment at work, men as well as women can be the victims of sexual harassment. Indeed, women as well as men can be the perpetrators of sexual harassment. Moreover, men can harass men and women can harass women. A victim’s legal options are not narrowed because he or she is of the same sex as the harasser. However, the perpetrator of the harassment must be motivated by the victim’s sex.

The courts recognize two types of sexual harassment **quid pro quo** harassment and **hostile work environment**.

“Quid Pro Quo” Harassment

The first type of sexual harassment, called “quid pro quo” harassment, exists when an employee is forced to submit to sexual demands under the threat of discharge or other retaliation, in return for getting hired, for not being fired, or for getting benefits such as bonuses, raises or promotions. This type of claim also exists where an employee is retaliated against for rebuffing sexual advances, even if retaliation was not threatened in advance. If your job conditions depend on whether you give in to sexual advances, you are a victim of quid pro quo harassment.

For example, in a case in New York, a Columbia University work-study student filed a sexual harassment charge against her supervisor. The student worker claimed that her supervisor had demanded sex in return for raises, promotions, and other job benefits. The federal court held that the student did not have to prove that she suffered economic harm in order to bring the charge against her supervisor. In addition, the fact that the student had actually engaged in sexual relations with her supervisor did not preclude her from pursuing her suit.

In most cases, an employer is automatically responsible for acts of harassment by supervisors or managers in quid pro quo harassment cases, regardless of whether the employer knew about the supervisor’s conduct. Unlike most hostile environment claims (as discussed below), a quid pro quo claim may be based on a single incident.

Hostile Work Environment Claims

The more common type of harassment is the “hostile work environment” type. As defined by the EEOC, this type of harassment involves sexual conduct that has the purpose or effect of (1) creating an intimidating, hostile or offensive working environment based on your sex; (2) unreasonably interfering with an individual’s work performance; or (3) otherwise adversely affecting an individual’s employment opportunities.

In the 1993 case of *Harris v. Forklift Systems, Inc.*, the Supreme Court held that the following circumstances must be considered in evaluating whether a hostile environment exists:

- The frequency of the discriminatory conduct;
- The severity of the conduct;
- Whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and
- Whether the conduct “unreasonably interferes with the employee’s work performance.”

Thus, a few isolated incidents will not amount to a finding of a hostile environment. The more pervasive and severe the pattern of offensive conduct, however, the more likely you are to prevail in a charge.

Examples of conduct that may constitute a hostile environment include a supervisor’s or co-worker’s frequent requests for a sexual relationship or intrusive and personal questions about your sex life, menstruation, bra size, or body. Conduct may be considered sexual harassment even if the person did not consider or intend for his conduct to be offensive. Also, conduct and behavior does not have to be directed specifically at you. A hostile work environment may be created by generalized comments and behavior, or physical objects (such as posted pornography or email circulated pornography) as long as these produce a sufficiently abusive working environment.

Your own view of the conduct will be considered in the determination of whether a hostile environment existed. In other words, you must have been actually offended or injured by the conduct. Evidence that you were a willing participant in the conduct will most likely undermine the allegation that you felt “harassed.” On the other hand, you need not show serious psychological injury in order to prevail in a sexual harassment action.

Special Considerations in Dealing with Harassment by a Supervisor: When hostile work environment is the basis of the sexual harassment claim, an employer is automatically liable for a supervisor’s harassing behavior that results in a tangible employment action. A tangible employment action includes hiring and firing, promotions and demotions, job reassignments, compensation and benefit decisions, etc. These actions can usually only be performed by a supervisor or a person with authority from the company.

When the harassment does not include a tangible employment action, the employer has an affirmative defense to the supervisor's harassment. This means that the employer is not liable if it can prove that it took reasonable care to prevent and correct promptly any harassment AND the employee unreasonably failed to take advantage of any preventive or corrective opportunity provided or to avoid harm otherwise.

Special Considerations in Dealing with Harassment by a Co-Worker: In the case of co-worker harassment, the employer is only liable when it can be shown that the employer either knew or reasonably should have known about the harassment AND the employer failed to promptly and reasonably investigate and remedy the harassment. For example, an employer may be liable for permitting the display of "pin-up calendars" or other sexually explicit materials after being informed or seeing the materials in the work place and failing to remove the items.

Harassment Policies

If you are a victim of harassment, make sure that you review your company's anti-harassment policy and that you seek relief under that policy (unless it is evident that taking action under the policy would be futile). A good policy will specifically state what kind of behavior is objectionable and tell you who to report it to. If your supervisor is the culprit, the policy should have alternate means of reporting the behavior so that you do not have to go through your supervisor.

Your employer's failure to have such a policy, or their failure to make the policy available may increase their potential liability for hostile work environment claims.

Internal Investigations & Disciplinary Actions

Internal investigations, appropriate disciplinary action, or transfer of you or your harasser to a comparable position within the company may absolve your employer from liability for the offensive conduct. This means that even if you prove that you have been sexually harassed, your employer may not have to pay damages (compensate you for the harassment), if it has promptly put an end to the conduct.

Stopping and Proving Sexual Harassment

To stop sexual harassment at work or to document it for the purposes of a charge or lawsuit, the following steps are advisable:

1. Obtain copies of any evaluations of your work, so that your employer cannot say that you were terminated, disciplined or denied other employment opportunities because of poor work performance.
2. To the extent consistent with your own safety, confront the harasser directly, preferably in writing, with a copy to higher level supervisors or managers, telling him that his behavior is unwelcome, inappropriate, and will not be tolerated.

3. Keep a contemporaneous record of the harassing behavior, and be specific. Write down the dates, times, locations and exact words or acts, witnesses, the relationship of each witness and the harasser to you, your reactions and responses, and the reactions and comments of witnesses. Keep any notes, letters or emails that the harasser gives to you.
4. Get information from the human resources department or designated union representative concerning your company's sex discrimination policy and grievance procedures. File a written formal complaint with the company. Follow the company's procedures step-by-step. If there are no formal procedures, go to your supervisor's boss. Keep a record of each meeting, including dates, what was said, who attended, and what happened, if anything, as a result.
5. Confide in co-workers. You might find a pattern of harassment, and it will help to establish your credibility in the lawsuit.
6. If your employer fails to take sufficient steps to stop the harassment, consider legal action. As explained later in this booklet, action begins by filing a complaint with the EEOC, the MCHR or a local human relations agency.

Adapted from "Stopping Sexual Harassment" by Elissa Clarke, Labor Education and Research Project (1980).

Promotions, Training and Working Conditions

Although state and federal equal pay laws are limited to correcting wage discrimination, Title VII applies to virtually all other aspects of employment. Under Title VII (as well as under Maryland's Fair Employment Practices Law and various local ordinances), employers of over 15 employees must recruit, train and promote all of their employees without the taint of sex discrimination.

To prove sex discrimination in the area of promotions, you must first show the following:

- There was an available opening;
- You applied for the promotion (or established an interest in the position if an informal promotion system existed without applications);
- You were an available candidate for the promotion;
- You were qualified for the promotion; and
- You had equal or superior qualifications to those of the person selected for the promotion.

To defend against this "prima facie" showing of discrimination, your employer must identify a specific, non-sex-related reason for why it promoted the other applicant instead of you. Then, it is up to you to demonstrate that the reason stated by the employer is, in fact, a pretext for sex discrimination.

In addition, an employer may not steer its women employees into departments where there is no opportunity for advancement. For example, discrimination may exist where a department is comprised mostly of women, especially if the highest position pays less than similar positions in other departments.

Moreover, a woman should be permitted to make the same career decisions that a man is allowed to make. An employer may not, for example, refuse to offer a married woman a transfer to another city, simply because the employer assumes she will not move, or because the employer does not want to disrupt her family life. Likewise, access to training and apprenticeship programs must be offered to all employees without regard to sex.

Working conditions also must be the same for women as for men. If men are allowed to take coffee breaks or eat at their desks, women also must be permitted the same privileges.

Pregnancy

The Pregnancy Discrimination Act (“PDA”) and Maryland’s Fair Employment Practices Law protect women from discrimination on the basis of pregnancy, childbirth or related medical conditions. Moreover, Executive Order 11246 requires government contractors to provide the same benefits for pregnancy-related conditions as they do for other temporary disabilities.

Under the PDA and Maryland’s Fair Employment Practices Law, your employer must treat pregnancy in the same way it treats any other “temporary disability.” This means that a disability due to pregnancy must be treated the same as a disability due to heart attack, surgery, or the like.

For example, if your employer requires pregnant employees to provide a doctor’s statement on the length of leave they will need, the employer must require all temporarily disabled employees to do so. Similarly, if your employer provides insurance for employees to cover temporary disabilities, it must also provide coverage for pregnancy-related expenses similar to the coverage provided for other medical conditions.

Employers are also prohibited from stopping a woman from working at an arbitrary point in her pregnancy, such as six months, seven months, or even nine months, unless the pregnancy poses a potential risk of serious harm to third parties. An employer who excludes all fertile women workers or all pregnant workers from a toxic environment must show that such an exclusion is a bona fide occupational requirement reasonably necessary for actual job performance.

The laws do not require an employer to provide health insurance for abortions unless the mother’s life is endangered by the pregnancy or medical complications arise after performance of an abortion. Of course, an employer may provide coverage for abortions if it wishes to do so.

Unions/Labor Organizations

Labor organizations bear an obligation under the federal civil rights law, Title VII, not to discriminate against employees as members of a union or as members of a bargaining unit that

the union represents. Women employees who are represented by a union and believe the union is discriminating in its representational duties on the basis of their sex may file a charge with the EEOC. (Of course, unions are also liable under Title VII and other fair employment laws for any unlawful discrimination they commit in their capacity as employers.) Furthermore, the National Labor Relations Act (“NLRA”) imposes a duty on unions to fairly represent all of its members. This duty has been interpreted to include an obligation not to discriminate against employees on the basis of sex, or other such factors. Thus, a union that discriminates against its female members may be subject to discipline by the National Labor Relations Board (“NLRB”). Therefore, if you feel that your union has discriminated against you on the basis of your sex, you may also contact your local office of the NLRB to file a charge of a breach of the union’s duty of fair representation.

The NLRA also requires your union to oppose and affirmatively attempt to eliminate any discriminatory practices engaged in by your employer that come within the scope of the union’s collective bargaining powers. Examples of areas in which a union should fight for equality include wages, insurance benefits, sick pay, and retirement and pension plans.

Just as a union may sometimes be held responsible for the discrimination of an employer if it fails to act, an international union may under certain circumstances be found liable for the discriminatory practices of its locals. Your local NLRB office can assist you in making this determination.

Family and Medical Leave

The Family and Medical Leave Act (“FMLA”)

This federal statute protects eligible employees from losing their jobs if they need to take time off from work for the care of a newborn or recently adopted child, for their own serious health condition, or to care for a close relative who has a serious health condition. Specifically, the FMLA provides eligible employees with up to 12 weeks of unpaid, job-protected leave during a 12-month period.

You are eligible for FMLA coverage if the following applies:

- your company employs at least 50 people within a 75-mile radius;
- you have been employed for at least 12 months by your employer; and,
- you have worked at least 1,250 hours for your employer during the previous 12-month period.

Under the FMLA, you must ordinarily provide 30 days advance notice when the leave is “foreseeable,” as in the case of maternity leave. You may also be required to provide your employer with a medical certification of your condition.

For the duration of the FMLA leave, your employer must maintain your health coverage under any group health plan. However, you may be required to pay the premium.

In addition, upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms. Moreover, your use of FMLA leave may not result in the loss of any employment benefit that accrued before the start of your leave.

Maryland Family Leave

The Flexible Leave Act

Passed in 2008, this state law became effective October 1, 2008. Employers who have 15 or more employees must also allow any employee who has accrued paid leave under the employer's practice or policy to use that paid leave for the care for the illness of an immediate family member, defined as spouse, child or parent. Annotated Code of Maryland, Labor & Employment Article, Section 3-802.

Adoption Leave

This law establishes equity for adoptive parents under employers' leave policies. Specifically, it states: "An employer who provides leave with pay to an employee following the birth of the employee's child shall provide the same leave with pay to an employee when a child is placed with the employee for adoption." Md. Ann. Code, Labor & Employment, Section 3-801. (This law was located at Section 3-802 until October 1, 2008, when the Flexible Leave Act became operative).

Discrimination against Employees with Caregiving Responsibilities

With the exception of a few jurisdictions within the United States (Montgomery County, Maryland included), there is no explicit protection for discrimination against employees because of their status as a caretaker of others, such as children, ill spouses or elderly parents. For women workers who are mothers, this type of discrimination has also been called "maternal discrimination." This type of workplace discrimination has been receiving increasing attention, however, and may be remedied under current laws. The EEOC recently discussed this issue in its "Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities" (www.eeoc.gov/policy/docs/caregiving.html). The Center for WorkLife Law provides substantial information about this social problem and provides various resources, including a hotline and litigation support, to help challenge and overcome what it has identified as "Family Responsibilities Discrimination." See www.worklifelaw.org. Discrimination against caregivers can be challenged under many of our current fair employment laws, framed as a "sex-plus" form of discrimination. For more information about this type of discrimination, please review the above-referenced resources, or contact the WorkLife Law Family Responsibilities Discrimination Hotline by email at hotline@worklifelaw.org, or by phone at 1-800-981-9495 or 202-680-8964.

Unpaid Wages or other Compensation

Some women workers are particularly vulnerable to violations of state and federal wage and hour laws. For example, in many “informal” work arrangements, such as domestic service or baby-sitting (professions dominated by women), or many low-skilled or labor-intensive occupations, such as commercial cleaning, restaurant, beauty shop or temporary agency work, employers neglect to observe federal wage and hour laws. Immigrant women with limited English proficiency are especially vulnerable to these abuses. State and federal wage and hour laws require, with few exceptions, that employees be paid at least the minimum wage for all hours worked. “Work” includes all time actually serving the employer, as well as all time spent “on call,” which includes all time in which the employee is not free to pursue her own activities and may be summoned for work. Thus, a housekeeper who is expected to remain in her employer’s home all day, regardless of whether there is any work to do, is “on call,” and must be compensated accordingly.

In cases where employers of domestic servants or others refuse to pay at least the minimum wage for all hours worked, the employee may seek relief under the Fair Labor Standards Act. The best place to begin such an action is by contacting the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor, or found at www.dol.gov. The Baltimore regional office of the U.S. DOL is:

U.S. Dept. of Labor
Employment Standards Administration
Wage & Hour Division
Room 207 Appraisers Stores Building
103 South Gay Street
Baltimore, MD 21202-4061
Phone: 410-962-2265
1-866-4-USWAGE
(1-866-487-9243)

The Maryland Department of Labor, Licensing and Regulation’s Employment Standards Division also pursues claims of unpaid wages and violations of Maryland’s minimum, prevailing and living wage statutes. They can be reached at 410-767-2357. Wage claims must be submitted in writing; instructions and forms may be found at:
<http://www.dllr.state.md.us/labor/essclaimform.htm>.

The wage claim form must be mailed (not faxed or emailed) to:

DLLR, State of Maryland,
Employment Standards Services,
1100 N. Eutaw Street, Baltimore, MD 21201

NOTE: The fact that a worker does not have lawful immigration status in the U.S. does not give an employer the right to violate labor and employment laws. Agencies and courts recognize the right of all workers, regardless of immigration status, to be paid in accordance with state and federal wage and hour and wage payment laws.

Retaliation against an Employee for Challenging Discrimination or other Violations of Law

It is not necessary to wait until the end of an employment relationship to file a charge of sex discrimination, violation of equal pay laws, or violation of wage and hour laws. Many women file such charges while they are still working, in hopes that the situation will be corrected and that they can continue to work in their jobs free from sex discrimination or other unlawful conduct.

In these cases, it is illegal to fire an employee for filing a charge or for suing her employer for discrimination or violation of some other work-related law. Moreover, your employer may not fire you or make conditions at work so intolerable that you are forced to resign.

Thus, in cases where you have filed a charge against your employer and are later terminated or otherwise retaliated against, you may supplement your charge with an additional allegation of “retaliation.” When the agency with which you have filed the charge investigates your claims, your employer will be asked to show non-discriminatory reasons for its post-charge conduct against you.

DISCRIMINATION AT THE END OF THE EMPLOYMENT RELATIONSHIP

Termination

The laws that protect you from discrimination in hiring or discrimination in the terms and conditions of your employment also apply to decisions to terminate. Thus, if you feel you have been fired on the basis of your sex, or because you complained about or took legal action to challenge unlawful conduct, you should consider filing a charge with the EEOC or the MCHR, according to the procedures set forth later in this booklet.

Termination also presents another set of issues relating to discrimination. Historically, unless an employee had a written contract with her employer identifying the length of employment and specific conditions under which the employment could be terminated, the employee could be fired **at will**---that is, for any reason or no reason at all. Courts throughout the United States have set forth a few exceptions to this doctrine.

The first exception, called **wrongful discharge**, exists where the employee’s termination violates some mandate of public policy that does not have its own set of procedures for relief. For example, an “at-will” employee cannot be terminated for refusing to break the law, for taking time for jury duty, or for filing a worker’s compensation claim. If the employer does terminate the employee for such a reason, the employee may file suit in state court.

In many cases, however, alternative procedures for redress exist, and an employee must follow those procedures prior to filing suit. An employee alleging sex discrimination, for instance, may not immediately file suit in court; she must first file a charge with the EEOC or the MCHR. Similarly, in recent years “whistleblower” statutes have become increasingly prevalent, and in

many cases they establish their own procedures for redress, which, again, must always be followed prior to filing suit.

The one possible exception to the rule that persons alleging discrimination must first file a charge with the EEOC or the MCHR exists in cases where fewer than fifteen persons work for the employer, in which case the employer is not covered by Title VII or Maryland's Fair Employment Practices Law. The employee may then file suit in state court alleging wrongful discharge.

The second exception to the "at-will" doctrine exists in the form of a **breach of contract** action. Specifically, in many cases an employer will represent to its employees, by word or by deed, that it will never discharge an employee for non-economic reasons without cause or without following a designated set of procedures. In such cases, a court may find that a contract exists between the employer and the employee and that an arbitrary discharge, or a discharge in the absence of following internal procedures, has violated that contract. (A contract may be found, for example, to exist in a company handbook). Again, however, a person who perceives that she has been discharged because of some discriminatory motive of her employer should always file a charge with the EEOC or the MCHR.

Layoffs

The law concerning layoffs is virtually the same as for termination—that is, with a few exceptions, the "at-will" doctrine continues to be the law of the land. However, women in layoff situations should be mindful of how laws prohibiting discrimination may offer some protection.

If you have been laid off, you should consider whether the employer has treated women differently for the purposes of layoff (disparate treatment) or has caused a disproportionate impact on female employees by a seemingly neutral layoff policy (disparate impact). If there appears to be discriminatory treatment or impact based on sex in the context of layoffs, you might be able to obtain relief under Title VII or Maryland's Fair Employment Practices Law.

CHAPTER 5 - CHALLENGING DISCRIMINATION, FAILURE TO PAY WAGES OR FAILURE TO PROVIDE FAMILY OR MEDICAL LEAVE

Even before taking any legal steps (unless time is of the essence) you may wish to get some information regarding your legal rights by calling the Employment Law Hotline of the Women's Law Center of Maryland, Inc. at 1-877-422-9500. Call for hours of operation.

STEP ONE: THE CHARGE

In almost every employment discrimination situation, your first step in seeking relief within a legal process in Maryland is to file a charge (also known as a "complaint") with an administrative agency. The administrative agency will then investigate your claim and try to bring it to some resolution.

In cases involving violations of the federal or state Equal Pay Act, you do not have to file a charge with the EEOC. Similarly, if you believe your employer has violated the FMLA, the Fair Labor Standards Act (wage and hour law), or Maryland's Wage and Hour and Wage Payment laws, you may file suit in court without going through the administrative process. You do have the option of first filing an administrative charge with the EEOC, the Wage and Hour Division of the Department of Labor, or the Maryland Department of Labor Licensing and Regulation, depending on the case.

In each of these instances, it would be wise to have an attorney review your case and help you review the strengths and weaknesses of your claim of discrimination or other illegal conduct. If you plan to go directly to court in the type of case where that is possible, it is wise to obtain an attorney to represent you. While you do not need an attorney to file a charge, an attorney might be helpful in framing and wording your complaint, and advising you about applicable deadlines for filings. An attorney may require an hourly fee for these services, or they may be willing to take your case on contingency, that is, provide services for you that you will pay for at the end of a successful case.

Attorneys typically only take cases on contingency that they think they can either settle for a good amount or win. In these cases, you will not have to pay an hourly fee, but you will have to cover any expenses, such as filing fees, deposition costs, expert witness fees, etc.

The administrative agencies from which you may seek assistance are detailed below.

The Equal Employment Opportunity Commission (EEOC) and the Maryland Commission on Human Relations (MCHR)

The EEOC is the federal agency that handles all initial charges under Title VII and the federal Equal Pay Act (as well as under the Age Discrimination in Employment Act and the Americans with Disabilities Act). The MCHR handles all charges concerning alleged violations of Maryland's Fair Employment Practices Law and Maryland's Equal Pay Act, as well as all charges of discrimination within the Maryland State Government.

The EEOC and the MCHR have a work-sharing agreement that enables an employee in Maryland to file with either agency. In addition, you may also consider filing your charge with the appropriate local administrative agency, as explained below.

To be timely filed with the MCHR, you must file your charge within **six months** of the date that the last discriminatory act or event at issue took place. To be timely filed with the EEOC, you must file within **180 days** of the last discriminatory act (except in cases involving the Equal Pay Act, which requires only that a law suit be filed within two years of the alleged violation, or within three years if the violation is willful). Charges filed with the MCHR may be filed online www.mchr.state.md.us.

There are certain circumstances in which an employee who files within 300 days has timely filed—but **do not delay filing a charge** in the hope that this later deadline may apply! If the discrimination is part of a “continuing practice” of your employer (that is, if another, related violation occurred within the six month or 180-day period), then you may file later, but in all cases you must be careful to file within six months (MCHR) or 180 days (EEOC) of the most recent discriminatory act, or your charge may be time-barred (that is, disallowed for being untimely).

Once a charge has been filed with an administrative agency, an investigator will contact the employer, union or employment agency and request further information relating to your charge. The investigator may also contact any witnesses that you suggest. Thus it is essential that you provide the investigator with the names and addresses of witnesses, as well as with all other written documentation of the allegations raised in your charge.

Please note that both the EEOC and the MCHR have well-developed mediation programs that are available to charging and charged parties to help them resolve disputes in a timely and mutually acceptable way. If the employer (or union or agency) is willing to mediate (informally attempt to settle) the problem, and you would like to proceed in this manner with a trained neutral mediator, you may opt to try mediation before proceeding with the administrative or judicial course of action. If mediation fails to result in a mutually acceptable resolution of the problem, you may continue with your charge. You can learn more about their mediation programs by contacting them directly.

If the agency investigating your charge determines that there is **probable cause** to support your claims, the agency will attempt to negotiate a settlement between you and your employer. At any time after 180 days, you may request a **right to sue letter** even if the agency has not completed its investigation.

Once the right to sue letter is issued, suit in federal court must be filed no later than 90 days after receipt of the “right to sue” letter. The time limitation, called a statute of limitations, is strictly enforced. Failure to file in a timely manner may result in a dismissal of your case.

In 2007, Maryland’s Fair Employment Practices Law was amended to track the procedures and remedies of Title VII. Now, after filing a charge with MCHR, the result may be either a mediated settlement, an administrative procedure, or you may file your case in court, either with

MCHR as your representative, with your own attorney or representing yourself. You still must file your charge with MCHR within 180 days of the discriminatory action. If the agency has not reached a finding or resolution within 180 days of the filing of your charge, you may elect to file a civil action or lawsuit directly in state court and must do so within 2 years from the date of the discriminatory action. Alternatively, if the agency makes a finding of discrimination and no remedy has been achieved, you have 30 days to elect whether to continue to pursue your case via an administrative process or in court with the MCHR as your representative. In the latter case, the Commission must file the civil action in court within 60 days of your election.

Wage and Hour Division, United States Department of Labor

If you believe that your employer has violated the Family and Medical Leave Act or the Fair Labor Standards Act, you may either sue directly in federal court or first file a charge against your employer with the local office of the Wage and Hour Division of the Department of Labor. Under these statutes, the Department of Labor is authorized to receive, investigate and attempt to resolve complaints. In addition, the Department of Labor is authorized to bring suit against an employer in federal court. Obtaining the assistance of the Wage and Hour Division is a cost-effective alternative to finding a private attorney, whose fees may not be worth the outcome.

Office of Federal Contract Compliance (OFCCP)

If your employer has federal contracts in amounts exceeding \$10,000, you may file a charge of sex discrimination with the OFCCP. The OFCCP can stop awards of federal contracts and can recover back pay for employees who are not protected by other laws, such as cases in which fewer than 15 people work for the employer.

A charge must be filed within 180 days of the discriminatory act or event. The OFCCP will investigate the charge unless it decides that the EEOC is the appropriate investigatory agency. Like the EEOC, the OFCCP will attempt to negotiate a settlement between you and your employer.

National Labor Relations Board (NLRB)

A union that discriminates against its members on the basis of sex is violating its duty of fair representation as mandated under the National Labor Relations Act. If you feel that your union is discriminating against you and/or other women, you may file an unfair labor practice charge against your union. The NLRB will investigate your charge and, if necessary, negotiate a settlement or pursue further action. Breach of the union's duty of fair representation can be remedied through a suit filed by the NLRB on the employee's behalf in federal court or through unfair labor practice proceedings before the NLRB.

Local (County or City) Agencies

Many counties and cities have human relations commissions or community relations commissions. Some of these commissions perform virtually the same investigative, negotiation and representation duties of the EEOC and the MCHR, and their own processes and remedies

are codified within Article 49B, including Sections unique to Montgomery, Howard and Prince George's County; Baltimore County; and, St. Mary's County. Some commissions cover employers with fewer than 15 employees. You should check whether your charge will be automatically filed with the MCHR and the EEOC. If it is not automatically filed with these organizations, you may want to file with the federal or state agency within the appropriate time limits. The MCHR will treat all charges filed with local agencies (listed at the back of this booklet) as filed with the MCHR as long as the charge was filed with the local commission within six months of the discriminatory act or event. For employees in Howard, Montgomery and Prince George's County, you should consult with an attorney before filing with the EEOC, MCHR or your county human relations/rights commission because your rights and remedies may be superior pursuant to your county ordinance than under state or federal law.

STEP TWO: NEGOTIATIONS OR MEDIATION

Prior to investigating your charge, the administrative agency will most likely offer your employer, union or employment agency the opportunity to enter into a pre-investigation settlement, either immediately or facilitated by a mediation process. Both the EEOC and MCHR have developed an extensive program of mediation that is available for the charging and charged parties without cost. This is a voluntary program; both parties must agree to the mediation process. (For more information about the EEOC's mediation program, see www.eeoc.gov/mediate/index.html, or contact them by phone (410) 209-2751.) You may participate in the mediation process with or without the assistance of an attorney. You should be certain of your goals (e.g. reinstatement, re-assignment of a harasser, etc.) when you file your charge so that you may assist the agency in resolving your case as quickly and effectively as possible.

If your employer refuses to enter into a pre-investigation settlement and, after investigation, is found by the agency to have likely engaged in illegal activity, you may have another opportunity to settle your charge. Again, you should be certain of your goals before you engage in any settlement negotiations.

STEP THREE: THE LAWSUIT

If you have exhausted your administrative remedies (i.e., filed a charge with the EEOC, the MCHR, or the OFCCP), and you are not satisfied with any settlement proposals, you may file suit in state or federal court. As noted above, you need not file a charge before filing suit for violation of the FMLA or the FLSA, although it is wise to at least consult with your local office of the Wage and Hour Division of the U.S. Department of Labor. **It is essential that you file your suit within the appropriate statutes of limitations, which are identified in the table following this section.**

Under the Maryland Fair Employment Practices law (MD Code, Art. 49B), if the Commission determines that there is probable cause to believe that the employer engaged in unlawful discrimination and no agreement has been reached to remedy the discrimination, you may choose to have your case heard by an Administrative Law Judge, who may award injunctive relief, reinstatement, back pay and compensatory damages. Alternatively, if the Commission

makes a probable cause finding and no settlement is reached, you may choose to have the MCHR bring a civil action in circuit court on your behalf. The same relief is available. Finally, if 180 days have passed since you filed a charge with MCHR and no settlement has been reached, you may file a lawsuit directly in state circuit court. The same relief is available in this circumstance. You may also seek punitive damages if you file in circuit court. You will need to demonstrate “actual malice” on the part of the employer to receive an award of punitive damages. Where compensatory or punitive damages are sought in a civil action, any party may demand a jury trial.

Before filing suit, you should be aware of the possible costs involved, including emotional, financial and expenditure of time. If you retain a lawyer, you will probably be expected to advance costs for the expenses of preparing for trial, including deposition transcripts, copying costs, transportation, etc. Moreover, the litigation process is very intrusive and, if your employer retains an attorney, you will likely be subjected to extensive questioning about your own conduct and background. You should be aware that your employer’s attorney will probably exploit any inconsistencies or vulnerabilities on your part. Any misrepresentations made by you on your employment application, for example, will likely be used to undermine your credibility.

Simply because the agency investigating your charge did not find evidence of discrimination does not mean that you will be unable to prove your case in court. Often there are facts that the agency has missed or witnesses that it has failed to interview. Nevertheless, if the agency has issued a determination that it did not find evidence of discrimination, your employer’s attorney will certainly stress that fact to the judge or jury.

In most cases, it would be best for you to have an attorney’s assistance and representation. An inquiry to friends, relatives, legal aid referral services, or members of women’s organizations may help you to locate an attorney who is knowledgeable and experienced in employment matters. **You may call the Employment Law Hotline of the Women’s Law Center to help you identify potential legal assistance. The Hotline number is 1-877-422-9500.** The Bar Associations of Baltimore City and most Maryland counties manage a Lawyer Referral Service that may be able to provide you with attorneys’ names and contact information, but will not comment on those attorneys’ skill or quality. Some referral programs also run low cost limited legal counseling services.

In many instances, sex discrimination has affected more than one victim. Where the number of affected women is sizable, a class action may be appropriate so that relief can be extended to all women who suffered discrimination. You should consult an attorney about the efficacy of filing a class-action suit.

If you intend to file a lawsuit, you must be very careful to act within the time permitted by law. If you miss a deadline, you will likely lose your chance to obtain any relief. The following table identifies the deadlines that you must not, under any circumstances, fail to meet.

LAWSUIT FILING DEADLINES AND REMEDIES

Statute	Limitations on filing suit	Remedies
Title VII Pregnancy Discrimination Act	File charge of discrimination within 180 days of most recent discriminatory action; file lawsuit within 90 days of the agency-issued right to sue letter	Back pay, reinstatement; compensatory and punitive damages, injunctive relief, attorneys' fees
Equal Pay Act (U.S.)	Two years after last discriminatory act; three years if act was willful	Up to two years back pay, liquidated (double) damages, injunctive relief, attorneys' fees
FMLA	Two years after last discriminatory act; three years if act was willful	Back pay, liquidated (double) damages, injunctive relief, attorneys' fees
FLSA	Two years after last discriminatory act; three years if act was willful	Back pay, liquidated (double) damages, injunctive relief, attorneys' fees
Maryland Fair Employment Practices Law (Art. 49B)	Complaint must be filed within six months of the alleged unlawful discrimination; election of civil or administrative route must be made within 30 days of agency notice; civil action may be filed by complainant after 180 days of filing administrative charge if no action has been taken and no later than two years from the date of the discriminatory employer action; if Commission chooses to file civil action on behalf of complaint, it must do so within 60 days of remedial route election.	Injunctive relief, reinstatement, back pay, attorneys' fees, compensatory damages between \$50,000-300,000 depending on employer size; other equitable relief
Maryland Wage and Hour (unpaid minimum wage and overtime)	Three years	Amount owed, plus attorneys' fees
Maryland Wage Payment	Three years	Up to three times the amount of unpaid compensation, attorneys' fees
Wrongful Discharge	Three years after discharge	Compensatory and punitive damages

*For information about filing a charge with an administrative agency, which generally must occur prior to filing suit, please consult Appendix.

CHAPTER 6 - CONCLUSION

As individuals and as class members, women have won jobs, promotions, reinstatement of seniority, back pay and other relief, thereby compelling employers to realize that discrimination is not only illegal but also costly. You can realize your hard-won rights by calling attention to instances of discrimination and by demanding recourse. In so doing, you will send a message to all employers that sex discrimination in employment will not be tolerated.

APPENDIX – WHERE TO SEEK HELP

For information about your legal rights and referral assistance, call the Employment Law Hotline of the Women’s Law Center, 1-877-422-9500. Experienced, volunteer employment attorneys staff the Hotline. The Hotline has limited hours of operation. Call the Hotline to find out the weekly hours of operation.

1. Equal Employment Opportunity (Anti-Discrimination) Enforcement Agencies

Equal Employment Opportunity Commission (Baltimore Office) (Enforcing Title VII, Equal Pay, Pregnancy Discrimination Act)

City Crescent Building
10 S. Howard Street
Third Floor
Baltimore, MD 21201

www.eeoc.gov

Tel. 1-800-669-4000 (EEOC’s National Contact Center)

Fax 410-962-4270

TTY 1-800-669-6820

The Baltimore Field Office is open Monday through Friday from 8:30 a.m. to 5:00 p.m. Walk-ins are taken 8:30 to 3:00 Monday through Thursday and 9:00 to Noon on Friday.

To go through an online assessment to see if your situation is something the EEOC may be able to help with, go to: <https://apps.eeoc.gov/eas/>

Office of Federal Contract Compliance (Baltimore Office) (for charges of discrimination against federal contractors)

U.S. Dept. of Labor
ESA- OFCCP
Appraisers Stores Building
103 South Gay Street
Room 202
Baltimore, MD 21203
Phone: (410) 962-3572
Fax: (410) 962-0159

Maryland Commission on Human Relations

Central Office -- Baltimore

William Donald Schaefer Tower
6 St. Paul Street, Suite 900
Baltimore, MD 21201
www.mchr.state.md.us
Tel. 410-767-8600
Toll-free outside Baltimore 1-800-637-6247
Fax 410-333-1841
TTY 410-333-1737

Western Office (Hagerstown)

44 North Potomac Street, Suite 202
Hagerstown, Maryland 21740
Telephone: (301) 797-8521
Fax: (301) 791-3060

Southern Office (Leonardstown)

Joseph P. Carter Center
23110 Leonard Hall Drive
Post Office Box 653
Leonardtown, MD 20650
Telephone: (301) 880-2740
Fax: (301) 880-2741

Eastern Shore Office (Salisbury)

201 Baptist Street, Suite 33
Salisbury, Maryland 21801
Telephone: (410) 713-3611
Fax: (410) 713-3614

County and City Human Relations Commissions

Annapolis City Human Relations Commission

93 Main Street
Annapolis, MD 21401
410-263-7998

Anne Arundel County Human Relations Commission

Anne Arundel Center
Room 420
Severn, MD 21401
410-222-1155

Baltimore City Community Relations Commission

10 N. Calvert Street
Suite 915
Baltimore, MD 21202
410-396-3141

Baltimore County Human Relations Commission

400 Washington Ave.
Old Courthouse - Suite 106
Towson, MD 21294
410-887-5917

Calvert County Commission on Human Relations

PO Box 2081
Prince Frederick, MD 20678
410-535 4400
Commissioners
410-535-5594

City of Cumberland Community Relations

PO Box 1702 City Hall Plaza
Cumberland, MD 21052
301-759-6446

Frederick County Human Relations Department & Commission

520 N. Market St.
Frederick, MD 21701
301-600-1109

Harford County Human Relations Council

220 S. Main street
Bel Air, MD 21014
410-638-4739

Howard County Office of Human Rights

6751 Columbia Gateway Drive
Columbia, MD 21046-2150
410-313-6430
TTY# 410-313-6401

Montgomery County

Office of Human Rights
21 Maryland Ave.
Rockville MD 20850
240-777-8450
TTY# 240-777-8480

Pocomoke City Human Relations

402 Bank Street
Pocomoke City, MD 21850
410-957-0325

Prince George's County Human Relations Commission

1400 McCormick Drive
Suite 245
Largo, MD 20774
301-883-6170

Rockville Human Rights Commission

City Hall – Maryland & Vinson
Rockville, MD 20850
240-314-8108

Family Responsibilities Discrimination Hotline This nationwide hotline is a project of the Center for WorkLife Law – www.worklifelaw.org – and gives information about family responsibilities discrimination as an emerging legal framework for discrimination against caregivers. The program also has a lawyer referral component: 1-800-981-9495.

National Labor Relations Board For a claim that a labor union is engaging in sex discrimination against a member or member of a bargaining unit, the employee may file with the EEOC, or file a charge of an “unfair labor practice” with the NLRB.

The National Labor Relations Board

Baltimore (Region 5)

The Appraisers Store Building

103 S. Gay Street - 8th Floor

Baltimore, MD 21202-4061

Hours of Operation: 8:15 am - 4:45 pm (EST)

TEL: 410-962-2822

FAX: 410-962-2198

www.nlr.gov

Equal Pay, FMLA and Wage and Hour Issues**United States Department of Labor (FMLA, Wage and Hour/Overtime)**

Employment Standards, Wage and Hour Division

Fallon Federal Building

31 Hopkins Plaza

Baltimore, MD 21201

1-866-487-9243

(410) 962-2265

www.wagehour.dol.gov

**Maryland Department of Labor, Licensing & Regulation (Equal Pay for Equal Work,
Wage and Hour and Wage Payment complaints)**

DLLR, State of Maryland,

Employment Standards Services,

1100 N. Eutaw Street, Baltimore, MD 21201

Tel. 410-767-2357

Link to wage claim form and instructions:

<http://www.dllr.state.md.us/labor/essclaimform.htm>

THE WOMEN'S LAW CENTER OF MARYLAND, INC.

The Women's Law Center of Maryland, Inc. is a non-profit corporation comprised of lawyers, judges, law students, social service professionals and other concerned persons who seek to promote the equality of women in the letter, spirit, and practice of the law. Through litigation, education, legislation and judicial selection, the Women's Law Center aims to eliminate legal, economic, social and political discrimination against women.

In addition to, *Sex Discrimination in Employment*, the Women's Law Center has published *Legal Rights in Marriage and Divorce in Maryland*, *The Legal Rights of Unmarried Cohabitants in Maryland*, *Battered: What Can I Do?- A Manual For Survival*, and *Your Money Matters*.

For further information, contact the Women's Law Center at:

305 W. Chesapeake Ave.
Suite 201
Towson, MD 21204
(410) 321-8761
admin@wlcmd.org
www.wlcmd.org

This publication is available from the Maryland Women's Law Center and the Maryland Commission for Women. <http://www.dhr.state.md.us/mcw/publications.php>